

Supreme Court, U. S.
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**In the
Supreme Court of the United States**

OCTOBER TERM, 1977

NO. 76-1143

RAY MARSHALL, SECRETARY OF LABOR,
ET AL.,

Appellants

VERSUS

BARLOW'S, INC.

On Appeal from the United States District Court
For the District of Idaho

BRIEF FOR THE AMERICAN CONSERVATIVE
UNION AS AMICUS CURIAE

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SUPREME COURT OF THE UNITED STATES

NO. 76 - 1143

RAY MARSHALL, SECRETARY OF LABOR, ET AL.
Appellants

versus

BARLOW'S INC.,
Appellee

On Appeal from The United States District Court
For the District of Idaho

BRIEF FOR THE AMERICAN CONSERVATIVE UNION
AS AMICUS CURIAE

This brief *amicus curiae* is filed in support of the position of appellee by the American Conservative Union with the consent of the parties, as provided by Rule 42 of the Rules of this Court.

INTEREST OF THE AMICUS CURIAE

The American Conservative Union is a public interest group with more than 100,000 members and 40 state affiliate organizations. Its members subscribe to the philosophy of Thomas Jefferson that that government which governs least, governs best. Since its foundation in 1964 it has been recognized as a strong advocate of constitutional government.

Warrantless inspections under the Occupational Safety and Health Act of 1970 (OSHA) - present a significant con-

stitutional question. In urging this appeal the Secretary of Labor seeks to abolish the Fourth Amendment rights of virtually every place of business in this nation.

We therefore take this opportunity to present to the Court our view that the guarantees of the Fourth Amendment prohibit warrantless OSHA searches.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Occupational Safety and Health Act of 1970¹ is probably the most controversial piece of legislation enacted in the last quarter of a century.²

OSHA coverage is comprehensive. It includes virtually every employer in the country. No other piece of federal legislation so extensively and pervasively involves itself in the affairs of American private industry.³

1. 29 USC §651-78 (1970). The inspection provisions (§8(a)) are set out in full in Appendix A

2. Comment, "OSHA v The Fourth Amendment: Should Search Warrants be Required For 'Spot Check' Inspections?" 29 Baylor L. Rev. 283 (1977); Comment, "Due Process and Employee Safety: Conflict in OSHA Enforcement Procedures", 84 Yale Law Journal 1380 (1975).

3. *Practising Law Institute, Occupational Safety and Health Act: Trends and Developments* 9 (M. Stokes ed. 1974). See also Robbins, "Truth and Rumor About OSHA," 33 Fed. B.J. 149, (1974). There the author observed, "OSHA coverage is comprehensive. Virtually every private employer, except those specifically excepted by virtue of coverage under other legislation and those who are self-employed, is included." As one Senator has observed, OSHA applies to "every business affecting commerce in the entire United States, ranging anywhere from a big steel company to a shoeshine shop." 116 Cong. Rec. 36,509 (1970) (remarks of Senator Dominick). At page 15 of his brief the Secretary states the Act covers "nearly five million work-places."

OSHA's arrogant and gestapo-like actions have aroused the concern of legislators, courts and commentators, and have incurred the hostility of employers and businessmen nationwide. Agency representatives have told employers "we don't give a damn about your constitutional rights. As far as we are concerned, you don't have any because you are in business."⁴

Given the breadth of the Occupational Safety and Health Act and its potential for serious abuse, the preservation of individual rights demands strict adherence to the requirements of the fourth amendment. The warrant requirement of the Fourth Amendment applies to OSHA inspections and should not be swept aside simply for the convenience of the Secretary. As this Court has pointed out, administrative inspections are "unreasonable" under the Fourth Amendment unless authorized by valid search warrant. *Camara v. Municipal Court*, 387 U.S. 523 (1967), *See v. City of Seattle*, 387 U.S. 541 (1967).

Numerous federal and state courts have considered the question of OSHA inspections and have overwhelmingly concluded that warrantless OSHA searches do not comply with Fourth Amendment standards and cannot be countenanced.

The Secretary's arguments concerning the need for and

4. In *Dunlop v. Hertzler Enterprises Inc.*, 418 F.Supp. 627 (1976), discussed infra, OSHA not only attempted an inspection of Hertzler's business, but of his adjacent home as well because his employees kept their lunches there in his refrigerator. The above statement was made by the Area Director when Hertzler inquired as to his constitutional rights. Hertzler is not an isolated incident.

reasonableness of warrantless OSHA inspections are belied by the Act itself, the legislative history of the Act, the Secretary's own procedures, and actual experience. The requirement for a warrant -- issued on a showing of probable cause -- has not and will not prevent effective enforcement of the Act.

ARGUMENT

I. HISTORY OF THE FOURTH AMENDMENT

The right against searches of home and property dates back to Old Testament times. Freedom from warrantless and unreasonable searches was recognized by the Romans. English Law precedents against warrantless searches predate Magna Carta.⁵

In the Seventeenth Century writings of such authorities as Sir Edward Coke and Chief Justice Hale, the chief limitations upon the exercise of search and seizure now embodied in such Constitutional provisions as the Fourth Amendment are already found presented either as law or as recommendations of the better practice, which later hardened into law.⁶

The great debate in Seventeenth Century England concerned the legality of "general warrants" -- which allowed officials of the Crown to enter any premises at any time to search for violations of the law or stolen property. (The

5. See generally "The History and Development of the Fourth Amendment to the United States Constitution," Johns Hopkins University Studies in Historical and Political Science, Series 55, No. 2, 1937.

6. Sir Matthew Hale, *History of the Pleas of the Crown*, (Philadelphia 1847) Vol. I, p. 580; Vol. II, p. 112.

searches under general warrants were similar to OSHA inspections, except OSHA substitutes "credentials" for the warrant).

The general warrant was held by Chief Justice Hale to be void.

"And, therefore . . . these general warrants . . . are not justifiable, for it makes the [officer] to be in effect the judge; therefore, searches made by pretense of such general warrants give no more power to the officer than what they may do by law without them."⁷

Hale went on to say that only specific warrants, limited in time and place and issued on probable cause were valid.

In the case of *Huckle v. Money*, 95 Eng. Rep. 768 (1763), Chief Justice Pratt stated that

"To enter a man's house by virtue of a nameless warrant is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour."

In America the validity of searches and search warrants first arose in a dispute over the Writs of Assistance -- which empowered officers of the Crown to search at will, and authorized the apprehension of undescribed persons and the indiscriminate seizure of property.

The inherent rights of the individual versus the power of the government to issue warrants collided in a case argued

7. Hale, Vol. II, p. 150.

by James Otis in 1761 and recorded by John Adams.⁸ Otis eloquently argued against the Writs of Assistance:

"I was described by one of the Court to look into the books and consider the question now before the Court concerning Writs of Assistance. It appears to me (may it please your Honours) the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of the Constitution, that ever was found in an English law-book. And as it is in opposition to a kind of power, the exercise of which in former periods of English history cost one King of England his head and another his throne, I have taken more pains in this cause, than I ever will take again.

". . . Writs of one kind may be legal, that is, special writs directed to special officers, and to search certain houses, especially set forth in the writ, may be granted . . . upon oath made . . . by the person . . . that he suspects such goods to be concealed in those very places he desires to search.

"*Special warrants only are legal.* The writ prayed for in this petition being general is illegal. It is a power that places the liberty of every man in the hands of every petty officer.

"No acts of Parliament can establish such writs; though it should be made in the very words of

8. 44. Petition of Lechmere, *Legal Papers of John Adams*, Vol. II, pp. 106-144.

the petition it would be void. An act against the Constitution is void."⁹

On July 3, 1776 John Adams wrote his wife from the Second Continental Congress that the resolution of independence had been passed and recollected "the argument concerning writs of assistance, which I have hitherto considered as the commencement of the controversy between Great Britain and America. . ." ¹⁰(emphasis added)

In 1886 the United States Supreme Court recognized that the debate over warrantless searches "was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country." *Boyd vs. United States*, 116 U.S. 616, 625.

As reflected by Adams, the Founders of this Country considered the people's right to be secure in their persons and property, and to be free from unreasonable searches to be basic. They believed *all* power is vested in the people -- and were willing to relinquish this right *only* to the extent any search was conducted pursuant to a warrant issued upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹¹

The First American precedent of a constitutional character for the Fourth Amendment was the Virginia Bill of

9. Ibid.

10. *Works of John Adams*, Vol. X, p. 276. See also Mabel Hill, *Liberty Documents* (New York, 1901) pp. 188-189. It was Adams' view that the issue of (what amounted to warrantless) searches under the Writs of Assistance was the spark that touched off the fight for independence. "Then and there the child Independence was born."

11. Fourth Amendment, United States Constitution.

Rights of 1776 -- which was later the pattern for the first ten amendments (Bill of Rights) to the Constitution.¹²

Although every other state followed Virginia's lead in adopting a Bill of Rights, many of the delegates to the Constitutional Convention opposed the inclusion of a Bill of Rights in the new constitution because they felt that "by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication that those rights which were not singled out, were intended to be assigned into the hands of the general government, and were consequently insecure."¹³

Others, however, such as Thomas Jefferson, James Madison and Patrick Henry wanted to specifically enumerate certain rights -- *since in their experience these were rights government eventually most encroached upon!*¹⁴

In the end, the latter view prevailed and a Bill of Rights in the form of ten amendments was attached to the Constitution. The prohibition against warrantless searches and seizures was included as the Fourth Amendment.

And today, in the words of James Otis, "No acts of [Congress] can establish such a [warrantless inspection]. An act against the Constitution is void."

12. See *Works of John Adams*, Vol. 3, p. 220; *The History and Development of the Fourth Amendment to the United States Constitution*, Johns Hopkins, p. 79; *The Papers of George Mason*, Vol. 1, pp. 274-291.

13. *Writings of James Madison*, Vol. V, p. 384; *Alexander Hamilton, The Federalist*, No. LXXXIV; *The Works of Alexander Hamilton*, Vol. 12, pp. 324-326.

14. *Writings of James Madison*, Vol. V, pp. 376-478.

This principle was reiterated by the Supreme Court in 1973 when it stated "it is clear of course that no act of Congress can authorize a violation of the Constitution." *Almeida-Sanchez v. United States*, 413 U.S. 266, 272.

II. DEVELOPMENT BY THE SUPREME COURT

During the century following the adoption of the Federal Constitution and its first Ten Amendments only a few cases involving interpretation of the Fourth Amendment reached the Supreme Court. The first case of significance was *Boyd v. United States*, 116 U.S. 616 (1886), which did much to chart the subsequent course of the Federal law.

Boyd was an action under customs revenue laws that provided civil and criminal penalties. The government prosecutor sought the production of defendant's documents to prove the value of 35 cases of plate glass. When the defendant argued the Fourth and Fifth Amendments prohibited what amounted to a seizure of his papers, the government responded that the Fourth Amendment was not applicable because this was a civil proceeding. After examining the history of the Fourth and Fifth Amendments, the Supreme Court stated that basically any search without a warrant was unreasonable. Then looking to the particular law in question, the Court concluded that although the "peculiar phraseology of this Act . . . expressly excludes criminal proceedings from its operation . . . [but rather] embraces civil suits for penalties and forfeitures . . ." the protections of the Fourth and Fifth Amendments were applicable.

"If the government prosecutor elects to waive an indictment and to file a civil information against

the claimants -- that is, civil in form -- can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens. This cannot be."¹⁵

The Court closed with an eloquent appeal for a liberal, and not merely a literal, construction of the Fourth Amendment.

"... it may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely; by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against stealthy encroachments thereon."¹⁶

Boyd was followed by many cases further defining the Fourth Amendment limitation on searches. However, it was not until 1949 that the question of administrative inspections under health and safety laws was decided.

15. 116 U.S. at 634.

16. 116 U.S. at 635. This language was declared to be "worth repeating here" in *Coolidge v. New Hampshire*, 403 U.S. 443, 454 (1971).

III. FOURTH AMENDMENT APPLICABLE TO ADMINISTRATIVE INSPECTIONS

The first reported case dealing squarely with administrative inspections under health laws is *District of Columbia v. Little*, 178 F2d 13, 13 ALR 2d 954 (DC Cir. 1949) affd. 339 U.S. 1 (1950).

In *Little* the defendant was convicted for obstructing an inspector of the Health Department because she refused to unlock the front door and allow an inspection without a warrant. Like OSHA in the instant case, the District of Columbia argued that the health officer was empowered by valid statutes (passed by Congress) to enforce the public health laws requiring owners and occupants of premises to keep them clean; that the law authorized warrantless inspections for that purpose; that the attempted inspection was at a reasonable time by a uniformed officer who stated his purpose; and that the right of inspection to prevent and correct dangers, deficiencies, and nuisances is a valid and reasonable exercise of the police power. The Court's opinion discloses an extraordinary understanding of constitutional law and is quoted at length:

"The simple question is: Can a health officer of the District of Columbia inspect a private home without a warrant if the owner or occupant objects?"

"The Fourth Amendment to the Constitution applies.

"When the Constitution prohibits unreasonable searches, it, of course, by implication, permits

reasonable searches. But reasonableness without a warrant is adjudged solely by the extremity of the circumstances of the moment and not by any general characteristic of the officer or his mission. Moreover, except for the most urgent of necessities, the question of reasonableness is for a magistrate and not for the enforcement officer.

"It is said to us that the regulations sought to be enforced by this search only incidentally involved criminal charges, that their purpose is to protect the public health. It is argued that the Fourth Amendment provision regarding searches is premised upon and limited by the Fifth Amendment provision regarding self-incrimination. There is no doctrine that search for garbage is reasonable while search for arms, stolen goods or gambling equipment is not. The argument is wholly without merit, preposterous, in fact.

"We need not go beyond the record in this case for an example of the extremity to which the doctrine of the appellant District would take us. One of the two complaints made by the unidentified informant was that some of the occupants of the house failed to avail themselves of the toilet facilities. Reducing appellant's doctrine to practicalities, the result would be that if the owner of a house be reliably charged with concealing a cache of arms and munitions for purposes of revolution, police officers could not search without either permission or warrant, but if the information be that an occupant fails to avail himself of the toilet facilities, government

officials could enter and examine the house over protest and without a warrant.¹⁷

"The Fourth Amendment did not confer a right upon the people. It was a precautionary statement of a lack of federal governmental power, coupled with a rigidly restricted permission to invade the existing right. The right guaranteed was a right already belonging to the people. To view the Amendment as a limitation upon an otherwise unlimited right of search is to invert completely the true posture of rights and the limitations thereon.

"Much of the argument of the District is devoted to establishing the public importance of the health laws. Assertions are also made of the beneficence and forbearance of health officers. We may assume both propositions. But the constitutional guarantee is not restricted to unimportant statutes and regulations or to malevolent and arrogant agents. Even for the most important laws and even for the wisest and most benign officials, a search warrant must be had.

"... When such regulations or laws purport to give officers authority to enter private homes against the occupant's protest, and without a warrant, when no compelling emergency involving public health is involved, a serious question of constitutional validity is raised. Health laws

17. Applying this to the instant case, if Barlow's Inc. was charged with concealing arms and munitions for purposes of revolution, police officers could not search without either permission or warrant, but if OSHA believes that Barlow's does not use open-end toilet seats, government officials may enter and inspect over protest and without a warrant.

can be enforced in the same manner as are other laws.

" . . . Absent such emergency, health laws are enforced by the police power and are subject to the same constitutional limitations as are other police powers. It is wholly fallacious to say that any particular police power is immune from constitutional restrictions."

District of Columbia v. Little was specifically mentioned and approved in *Camara v. Municipal Court*, 387 U.S. 523, 530 (1967). And the companion cases of *Camara* and *See v. City of Seattle*, 387 U.S. 541 (1967), are today definitive of the law dealing with warrant requirements for administrative searches and are controlling in the present case.

In *Camara v. Municipal Court* the Supreme Court heard the case "to reexamine whether administrative inspection programs, as presently authorized and conducted, violate Fourth Amendment rights . . ." 387 U.S. at 525.

In *Camara* appellant was charged with violating the San Francisco Housing Code by refusing to permit a warrantless inspection of his residence. Section 503 of the San Francisco Housing Code provided:

"Authorized employees of the City department or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of their proper credentials, have the right to enter, at reasonable times, any building, structure or premises in the City to perform any duty imposed upon them by the Municipal Code."¹⁸

18. Note the similarity to §8(a) of OSHA.

Nevertheless, when a city inspector sought to inspect his residence, appellant refused the inspector access to his apartment without a search warrant. Appellant argued that § 503 was contrary to the Fourth and Fourteenth Amendments in that it authorized municipal officials to enter a private dwelling without a search warrant and without probable cause to believe that a violation of the Housing Code existed therein.

The District Court of Appeal held that § 503 did not violate Fourth Amendment rights because it "is part of a regulatory scheme which is essentially civil rather than criminal in nature, inasmuch as that section creates a right of inspection which is limited in scope and may not be exercised under unreasonable conditions."

The United States Supreme Court reversed, saying

" . . . one governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by valid search warrant." 387 U.S. at 528-529 (emphasis added).

In *Camara*, appellee took the position that since the inspector does not ask that the property owner open his doors to a search for "evidence of criminal action," which may be used to secure the owner's criminal conviction, historic interests of "self-protection" jointly protected by the Fourth and Fifth Amendments were not involved.

The Supreme Court answered Appellee's argument by

stating

"...we cannot agree that the Fourth Amendment interests at stake in these inspection cases are merely 'peripheral.'

"It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.

"...Inspections of the kind we are here considering do in fact jeopardize 'self protection' interests of the property owner. Like most regulatory laws, fire, health and housing codes are enforced by criminal processes. In some cities, discovery of a violation by the inspector leads to criminal complaint. Even in cities where discovery of a violation produces only an administrative compliance order, refusal to comply is a criminal offense." 387 U.S. at 530-531.¹⁹

The Court also rejected the arguments (also made by OSHA in the instant case) that "the warrant process could not function effectively in this field" and "that the public interest demands warrantless administrative searches."

19. Although the criminal sanctions under the federal Act have been applied only rarely, it is a different story entirely in those twenty four states where OSHA is administered by state officials. Many states now regularly impose criminal sanctions against employers who decline to waive their Fourth Amendment rights and insist on a constitutional warrant as a prerequisite to an OSHA inspection. Cases such as *The People of The State of California v. Melvin Salwasser* CCH OSHD ¶ 21,797 (Fresno Municipal Court, 1977) and *State of North Carolina v. Cornelius Butler*, No. 77-CR2983 (Randolph County District Court, 1977) are typical.

"In summary, we hold that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual, and that the reasons put forth in *Frank v. Maryland* and in other cases for upholding these warrantless searches are insufficient to justify so substantial a weakening of the Fourth Amendment's protections." 387 U.S. at 534.

In the companion case of *See v. City of Seattle*, 387 U.S. 541 (1967), the Court held that *Camara* applied to similar inspections of commercial structures not used as private residences. The issue in *See* was whether a fire code inspector could enter and inspect appellant's locked commercial warehouse without a warrant and without probable cause to believe that a violation existed therein. The Court found the principles enunciated in the *Camara* opinion applicable.

"...we see no justification for so relaxing Fourth Amendment safeguards where the official inspection is intended to aid enforcement of laws prescribing minimum physical standards for commercial premises. As we explained in *Camara*, a search of private houses is presumptively unreasonable if conducted without a warrant. *The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too,*

has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant." 387 U.S. at 543 (emphasis added).

The Court observed that

"As governmental regulation of business enterprise has mushroomed in recent years, the need for effective investigative techniques to achieve the aims of such regulation has been the subject of substantial comment and legislation. Official entry upon commercial property is a technique commonly adopted by administrative agencies at all levels of government to enforce a variety of regulatory laws; thus, entry may permit inspection of the structure in which a business is housed, as in this case, or inspection of business products, or a perusal of financial books and records." 387 U.S. at 543, 544.

Noting that it had not previously had occasion to consider the Fourth Amendment's relation to this broad range of investigations, the Court likened the Fourth Amendment issues to those raised by the administrative subpoena of corporate books and records, and stated

"We find strong support in these subpoena cases for our conclusion that warrants are a necessary and a tolerable limitation on the right to enter upon and inspect commercial premises.

"It is these rather minimal limitations on administrative action which we think are constitutionally required in the case of investigative entry upon commercial establishments. The agency's particular demand for access will of course be measured, in terms of probable cause to issue a warrant, against a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved. *But the decision to enter and inspect will not be the product of the unreviewed discretion of the enforcement officer in the field.* Given the analogous investigative functions performed by the administrative subpoena and the demand for entry, we find untenable the proposition that the subpoena, which has been termed a "constructive" search, *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 202 is subject to Fourth Amendment limitations which do not apply to actual searches and inspections of commercial premises." 387 U.S. at 544-545 (emphasis added)

Therefore, the Court concluded, "*administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure.*" 387 U.S. at 545 (emphasis added).

As in *Camara*, the Court brushed aside the arguments of administrative expediency and the demand of the public interest for warrantless administrative searches. Excepting only "such accepted regulatory techniques as licensing pro-

grams which require inspections" the Court held

"...that the basic component of a reasonable search under the Fourth Amendment -- that it not be enforced without a suitable warrant procedure -- is applicable in this context, [administrative inspections] as in others, to business as well as to residential premises." 387 U.S. at 546

Since *Camara* and *See*, this Court has considered only one other case concerning administrative inspections conducted for purposes of promoting health and sanitation. And in *Air Pollution Variance Board v. Western Alfalfa Corp.*, 416 U.S. 861 (1974), it reaffirmed *Camara* and *See* in express terms.²⁰

The only exception to the warrant requirement for an administration search was recognized in *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), and *United States v. Biswell*, 406 U.S. 311 (1972). These two cases fall within the previously stated exception in *Camara v. Municipal Court* and *See v. Seattle* by holding that certain state or federally licensed activities may be inspected without a warrant.

In *Colonnade* the Court dealt with the statutory authorization for warrantless inspections of federally licensed dealers in alcoholic beverages. Noting that in *See* it had "reserved decision on the problems of licensing programs requiring inspection", 397 U.S. at 77, the Court held the *See*

20. The only non-OSHA case involving health and safety in the lower courts is *Klutz v. Beam*, 374 F.Supp. 1129 (W.D. N.C., 1973) (three-judge court) which disallowed a warrantless search of a private boat for violations of safety requirements.

test inapplicable because of the long history of government licensing and regulation of liquor.

In *United States v. Biswell*, respondent was a federally licensed firearms dealer. Again the Court²¹ held *See* inapplicable, stating that "when a dealer chooses to engage in this pervasively regulated business and to accept a federal license he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection." 406 U.S. at 316 (emphasis added).

Thus, in these two cases (*Colonnade* and *Biswell*) the Court merely reiterated that an exception to the warrant requirement of *See v. Seattle* and *Camara v. Municipal Court* is found where regulatory statutes authorize warrantless inspections of governmentally licensed and regulated enterprises.

In 1973 in *Almeida-Sanchez v. United States*, 413 U.S. 266, and again in 1977 in *G.M. Leasing Corp. v. United States*, 97 S.Ct., 619, U.S. the Court expressly confirmed that the only exception to the rule in *See* and *Camara* is in the case of governmentally licensed and regulated enterprises.

In *Almeida* the issue was whether the Border Patrol could search petitioner's car without a warrant. The government argued that the search was in effect an administrative inspection authorized by a valid federal statute, hence a warrantless search was authorized by *Colonnade Catering Corp. v. United States* and *United States v. Biswell*.

21. Justice White wrote the opinions in *Camara v. Municipal Court*, *See v. Seattle*, and *United States v. Biswell*. It was obviously not difficult to reconcile the latter case, since in *See*, 387 U.S. at 546, the Court had expressly excepted regulatory inspections under licensing programs.

The Supreme Court pointed out that *Colonnade* and *Biswell* were not applicable.

"Two other administrative inspection cases relied upon by the Government are equally inapposite. *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 90 S.Ct. 774, 25 L.ed. 2d 60, and *United States v. Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed. 2d 87, both approved warrantless inspections of commercial enterprises engaged in business closely regulated and licensed by the Government.

"A central difference between those cases and this one is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business. The businessman in a regulated industry in effect consents to the restrictions placed upon him. As the Court stated in *Biswell*.

'It is also plain that inspections for compliance with the Gun Control Act pose only limited threats to the dealer's justifiable expectations of privacy. When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection.' " 413 U.S. at 270, 271

Likewise, in January of this year the Court said in *G.M. Leasing Corp. v. United States*:

"The respondents argue that warrantless searches are justified by congressional enactment, as were the searches in *Biswell* and *Colonnade*, 97 S. Ct. at 630

"The respondents [further] argue that the interest in the collection of taxes is such as to bring this case within the reasoning of *Biswell* and *Colonnade*. Those cases involved voluntary participation in a highly regulated activity. (emphasis added) 97 S.Ct. at 631.

"In the present case, however, the intrusion into petitioner's privacy was not based on the nature of its business, its license, or any regulation of its activities, 97 S. Ct. at 629.

"The intrusion into petitioner's office is therefore governed by the normal Fourth Amendment rule that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara v. Municipal Court*, 387 U.S. at 528-29. 97 S.Ct. at 631.

Barlows -- and the millions of employers similarly situated -- are not engaged in a governmentally licensed and regulated industry. The Secretary of Labor is therefore required by the Fourth Amendment and the decisions of this

Court to obtain a search warrant.

The constitutional requirement of a warrant for administrative inspections has been restated and reaffirmed many times. It was followed in *District of Columbia v. Little*. It was reiterated by this Court in *Camara v. Municipal Court*. See *v. City of Seattle* held the same Fourth Amendment protections applicable to business and commercial establishments. This principle was only recently reaffirmed in *Air Pollution Variance Board v. West Alfalfa Corp.* Accordingly, inspections under the Occupational Safety and Health Act may be compelled only by means of a search warrant, based on probable cause.

IV. FOURTH AMENDMENT SPECIFICALLY APPLICABLE TO OSHA INSPECTIONS

The overwhelming consensus of federal and state courts is that the Fourth Amendment requires a warrant to compel objected to OSHA inspections.²²

Relevant OSHA authority begins with *Brennan v. Gibson's Products, Inc. of Plano*, 407 F.Supp. 154 (E.D. Tex. 1976). In *Gibson* a three-judge court was convened to "determine the meaning and constitutionality of . . . the inspection provisions of the Occupational Safety and Health Act."

22. The commentators also uniformly agree that warrants are required for OSHA inspections. See eg. Comment, "The Validity of Warrantless Searches Under The Occupational Safety and Health Act of 1970," 44 Cincinnati L. Rev. 105 (1975); Comment, "*Brennan v. Buckeye Industries, Inc.*: The Constitutionality of an OSHA Warrantless Search," 1975 Duke Law Journal 406; Comment, "Constitutional Law -- Fourth Amendment Prohibits Warrantless OSHA Searches -- *Brennan v. Gibson's Products, Inc.*," XI Suffolk University L. Rev. 156 (1976); Comment, "OSHA v. The Fourth Amendment: Should Search Warrants Be Required For 'Spot Check' Inspections?" 29 Baylor L. Rev. 283 (1977).

Speaking for a unanimous panel, Circuit Judge Gee wrote

"that facially the inspection provisions of OSHA amount to just such an attempt at a broad partial repeal of the Fourth Amendment as is beyond the powers of Congress. 407 F. Supp. at 157

"We deal, as is the rule in such cases, with a clash of near-absolutes. On the one hand we have the Fourth Amendment, a safeguard to ordered liberty indispensable and, historically at least, pre-eminent. On the other stands the congressional enactment, clearly subject to the interpretation that diminishing the injuries, and consequent loss and suffering, caused by hazardous working conditions justifies investing OSHA compliance officers with something very like a perpetual general warrant." 407 F.Supp. at 158

"OSHA's sweep is broad, and Congress' findings supporting it are slender. Made subject to its warrantless inspection is every private concern engaged in a business affecting commerce which has employees and all "environments" where these employees work. It thus embraces indiscriminately steel mills, automobile plants, fishing boats, farms and private schools, commercial art studios, accounting offices, and barber shops -- indeed, the whole spectrum of unrelated and disparate activities which compose private enterprise in the United States." 407 F.Supp. at 161

The court noted that *Gibson* -- unlike *Colonnade* and

Biswell - was not licensed, had no history of close regulation, and there was no "reason whatever, let alone a certainty, to believe the thing sought to be controlled - hazardous working conditions - exists in the area to be searched."

"Instead, we contemplate a roving commission in the vein of those considered in *Camara*, *See* and *Almeida-Sanchez*, exercised by these compliance officers in their unfettered discretion. No emergency existed, and no functional or general equivalent of probable cause such as *Camara* envisions is shown. This warrantless search would not comply with fourth amendment standards and cannot be countenanced." 407 F.Supp. at 162.

The Court concluded that

"Mindful of our duty to construe a statute, if possible, in a manner consistent with the fourth amendment, we believe that 29 U.S.C. § 657(a) was intended by Congress to authorize objected-to OSHA inspections only when made by a search warrant issued by a United States Magistrate or other judicial officer of the third branch under probable cause standards appropriate to administrative searches - that is, in a constitutional manner." 407 F.Supp. at 162

The Northern District of Ohio also rejected warrantless OSHA inspections in *Usery v. Rupp Forge*, F.Supp. ,

(1976), CCH OSHD ¶ 20,914, stating

"Upon review of the Act and the relevant case authority, the Court is constrained to conclude that Congress did not intend to enact, nor did it in fact enact, proceedings encouraging or authorizing broad, arbitrary administrative searches such as that herein suggested by petitioner. Clearly such unbridled authority is not cognizable under the Fourth Amendment to the United States Constitution."

Another three-judge court considered the same question in *Dunlop v. Hertzler Enterprises Inc.*, 418 F.Supp. 627 (D.N.M., 1976); and concluded

"Hertzler's subjection to the OSHA inspection scheme is based solely on its status as an employer. See n. 1 supra. As a manufacturer of ammunition and paper boxes, it is not engaged in a pervasively regulated business and thus cannot be deemed to have impliedly consented to regulatory inspection. See n. 11 supra. This circumstance renders the *Colonade-Biswell* rationale inapplicable here and requires that Hertzler's justifiable expectations of privacy be protected under the fourth amendment. Thus, the *Camara-See* rule is properly involved in this case, and the Administration must obtain a search warrant based on an appropriate showing of probable cause before Hertzler can be required to submit to the OSHA inspection previously resisted." 418 F.Supp. at 632.

In *Usery v. The Centrif-Air Machine Co., Inc., et al.*, 424 F. Supp. 959 (ND Ga. 1977) the Court agreed that "constitutional application of the inspection provisions contained in 29 USC § 657(a)" requires OSHA to obtain a warrant before being allowed to inspect.

On July 11, 1977 the Southern District of California found, in *Marshall v. Great Lakes Dredge and Dock Company*, F. Supp. (No. MISC 785-Civil) that § 657(a) "envision[s] a kind of walk-in authority to make inspections at any and all times on behalf of the OSHA regulations" and ruled that this apparent authority "is directly contrary to the requirements of the Fourth Amendment, prohibiting unreasonable searches and seizures."²³ See also *Marshall v. Shellcast Corp.*, F. Supp. (N.D. Ala. July 26, 1977) 46 U.S. L. Wk. 2080.

Numerous state courts - including the Alaska Supreme Court - have agreed that warrantless OSHA inspections are constitutionally prohibited.²⁴ And the courts of several

23. A transcript of the Court's remarks may be found at Appendix B since the case is not yet reported.

24. Any state which so desires may submit a state plan to assume responsibility for the administration of OSHA. 29 USC § 667.

If the Secretary of Labor approves the plan submitted by the State, the State becomes responsible for development and enforcement of safety and health standards. 29 USC § 667(c) requires that the state plan be "at least as effective" as the federal OSHA. Under § 667(c)(3) such plan must provide "for a right of entry and inspection . . . which is at least as effective" as 29 USC § 657.

Once a state plan is put into effect, the Secretary of Labor "shall make a continuing evaluation of the manner in which each state having a plan approved under this section is carrying out such plan" and may withdraw his approval and terminate the state plan § 667(f).

The cases referred to here have resulted from attempted warrantless inspections under these "approved state plans."

states have followed *Barlow's Inc.* and held their particular state Occupational Safety and Health Act unconstitutional because it failed to specifically provide for such a warrant. See *James R. Yocom, Commissioner of Labor, Commonwealth of Kentucky v. Burnette Tractor Co. Inc.*, (Court of Appeals of Kentucky, 1977) CCH OSHD ¶ 21,851; *State of Oregon ex rel Accident Prevention Division of the Workman's Compensation Board v. Keith R. Foster dba Keith Mfg. Co.* (Oregon Cir. Ct. 1976) CCH OSHD ¶ 21,255 (holding, inter alia, that an employer should be afforded the same rights as a common criminal); *State, ex rel New Mexico Environmental Improvement Agency v. Albuquerque Publishing Company* (NM Dist Ct. 1977) CCH OSHD ¶ 21,513; *State of Alaska Department of Labor v. General Home Repair and Roofing and Glen Smart* (Superior Ct. 1977) 6 BNA OCCUPATIONAL SAFETY & HEALTH REP. 948 *Woods & Rohde Inc. dba Alaska Truss & Millwork, et al. v. State of Alaska, Department of Labor*, P2d (Alaska Supreme Court, June 2, 1977) CCH OSHD ¶ 21,880; *Epstein v. Fitzwater Furniture* (Md. Cir. Ct. 1976), BNA 6 OCCUPATIONAL SAFETY AND HEALTH REP. 948; *State of California v. Melvin Salvasser* (Fresno Mun Ct. 1977) CCH OSHD ¶ 21,797.

The state cases can perhaps best be summed up in the words of Judge Croft, in *R. Lamar Baird v. State of Utah; State Industrial Commission, Division of Safety and Health, Utah Occupational Safety and Health Review Commission* (Utah Dist Ct. 1977) CCH OSHD ¶ 21,523:

"One cannot fault the declared public policy of this state as being to assure every man and woman in Utah a safe and healthful place in which to

work and to thereby preserve human resources (Sec. 35-9-2) but this cannot be achieved in a manner which results in the sacrifice of fundamental constitutional rights which the act, if carried out, would, in my opinion, substantially violate if not destroy.

"The act authorizes the industrial commission of Utah through the administrator of the occupational safety and health division of that commission, or his duly authorized representative, to write its own standards, rules and regulations; to enter, 'upon presenting appropriate credentials', without delay at reasonable times any workplace where work is performed by an employee of an employer; to inspect and investigate any workplace and all 'pertinent methods, operations, processes, conditions, structures, machines, apparatus, devices, equipment and materials therein'; and to question privately any employer, owner, operator, agent or employee (Sec. 35-9-8). A 'workplace' is any place of employment (Sec. 35-9-3(9)) and an 'employer' is any governmental entity, or company or any person having one or more workmen or operatives regularly employed in the same business under any contract for hire (Sec. 35-9-3(5)). The breadth of these definitions and the possibilities of unannounced, uninvited and compelled intrusions into the lives of all concerned staggers the imagination.

"No search warrant issued by a court upon probable cause is required under the provisions of this act to enter any 'workplace'. Any evidence of violation of any standard obtained during this inspection and in-

vestigation may obviously be used against an employer." ¶21,523 at p. 25,830.

Judge Croft's view is well stated. OSHA inspections are, for all practical purposes, unlimited in scope. The effect, when applied to nearly five million workplaces in this country, does truly "stagger the imagination."

The Secretary of Labor's argument to the contrary that warrantless OSHA inspections are "reasonable" is almost incredible.

V. THE SECRETARY'S CASE

The Secretary's statements concerning the operation of OSHA are inaccurate and misleading-- obviously in an attempt to "make OSHA fit" within the narrow *Colonnade-Biswell* exception to the warrant requirement. Since, as Amicus, we will have no opportunity to refute these clearly erroneous statements at oral argument, we deal briefly with them here.²⁵

1. THE "REASONABLE SCOPE" OF OSHA INSPECTIONS

The Secretary's entire case is predicated on the "reason-

25. The Secretary raises a number of extraneous points which we will not deal with because they are not relevant to the constitutional question involved here. For example, the Secretary repeatedly refers to statistics as to the number of work-related deaths and disabilities. These figures are very misleading -- if not largely inaccurate. However, even if correct, these statistics cannot justify abolishing the prior fourth amendment rights of every businessman in the country. There is an inalienable right to be free from warrantless searches. There is

ableness" of OSHA inspections. The Secretary urges that this case is not controlled by *Camara* or *See*, but rather by the holding in *United States v. Biswell*, because OSHA is "a regulatory inspection system of business premises that is carefully limited in time, place and scope." (Brief pp.32,41 42)

Nothing could be further from the truth.

It is difficult to conceive of a broader right of inspection or more expansive grant of authority than that granted by §8(a) of the Occupational Safety and Health Act. The Compliance officer may enter any factory, plant, establishment, construction site, or other area, workplace or environment to inspect any such place and all pertinent conditions, structures, machines, apparatus, devices, equipment and materials therein, and may question privately any employer, owner, operator, agent or employee. 29 U.S.C. 657(a). Employers are to find solace in the fact that this must all be done during "regular working hours or other reasonable time" -- of course.

An OSHA inspection may not be compared to those in *Colonnade* or *Biswell*. In theory and in actual practice, an OSHA inspection is unlimited.

(Footnote 25 continued)

not an inalienable right to employment in a workplace with split-end toilet seats. As Judge Prettyman said in *District of Columbia v. Little*, the right to be free from warrantless searches "is one of the indispensable ultimate essentials of our concept of civilization. It was firmly established in the common law as one of the bright features of the Anglo-Saxon contributions to human progress. It was not related to crime or suspicion of crime. It belonged to all men. * * *Health officers may chafe at the inconvenience, but so do police officers." 178 F2d at 16-18. Besides, the Secretary's argument misses the point entirely. As this Court said in *Camara v. Municipal Court* "the question is not . . . whether these inspections may be made, but whether they may be made without a warrant." 387 US at 533.

When this unlimited scope of inspection is applied to the five million workplaces in this country, it is easy to see why Judge Croft, in *Baird v. State of Utah*, stated, "The breadth of these definitions and the possibilities of unannounced, uninvited and compelled intrusions into the lives of all concerned staggers the imagination." OSHD ¶ 21,523 at p. 25,830. And why Judge Gee in the *Gibson* case decided that OSHA compliance officers have been invested "with something very like a perpetual general warrant." 407 F. Supp. at 158.

Warrantless OSHA inspections do not comply with Fourth Amendment standards and should not be tolerated.

2. STATUTORY SAFEGUARDS

The Secretary argues that since the statutory and procedural safeguards "limit" the scope of the inspection and the inspector's corresponding discretion to search (Brief, p. 37); and since the selection of inspection sites is made by area supervisors, not by the officers in the field (Brief, pp 44, 45) -- there is nothing left for a magistrate to do! The magistrate's review is therefore not required!

When this same point was raised in *Camara*, however, the Court answered

" . . . broad statutory safeguards are no substitute for individualized review." 387 U.S. at 533.

The unlimited scope of OSHA inspections has already been pointed out. The Secretary's statement that selection

of inspection sites is made by area supervisors is not quite correct either. Sworn testimony in hundreds of cases before the Occupational Safety and Health Review Commission reveals that while the area supervisors do provide a list or printout of businesses from which the inspector chooses, selection of the actual workplace to be inspected is in most cases made by the officer in the field. (In fact, most the OSHA cases discussed in this brief resulted from random inspections.)

Accordingly, there are questions of scope and discretion which should be reviewed by a magistrate.

In addition, it must be remembered that OSHA has been preempted in many instances by other regulatory agencies.²⁶ The possibility therefore exists that OSHA may not even apply to a given employer. In actual practice, OSHA has often attempted to enforce inspections against employers who were regulated by other agencies.²⁷ *Marshall v. Great Lakes Dredge and Dock Company*, supra, is a case directly in point, where OSHA attempted to inspect a vessel which was subject to preemptive Coast Guard jurisdiction and inspection.

26. Section 4(b)(1) of the Act, (29 U.S.C. § 653(b)(1)) provides: "Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 2021 of Title 42, exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health."

27. See e.g. *Newport News Shipbuilding and Drydock Co.*, OSHD ¶19,160 (1974) (Atomic Energy Commission); *Northwest Orient Airlines, Inc.*, OSHD ¶21,225 (1976) (Federal Aviation Administration); *Chevron Oil Co., et al.*, OSHD ¶21,606 (1977) (Office of Pipeline Safety of the Department of Transportation); *Dunlop v. Avondale*

Judicial review is imperative in such cases to determine which administrative agency -- often with conflicting regulations -- has jurisdiction over the employer in question; and whether OSHA has any right to inspect at all. Without such preliminary judicial determination an employer may face heavy monetary penalties or expensive administrative remedies from an agency which has no jurisdiction over him before he can obtain subsequent judicial review in the appellate courts.

Moreover -- and perhaps most importantly -- the magistrate's review is essential to prevent harassment of individual employers.

The Secretary has himself admitted that the limited number of compliance officers will enable OSHA to inspect each place of employment only once every 66 years.²⁸ Yet some employers have already been inspected numerous times.²⁹

(Footnote 27 continued)
Shipyards Inc., F.Supp. (ED La. 1976) OSHD ¶20,415 (Coast Guard); *Gearhart-Owen Industries Inc. v. Secretary of Labor*, F2d (DC Cir. 1975); OSHD ¶20,164; (Department of Defense); *Brennan v. Southern Railway Co.*, F.Supp. (MD Ga. 1975) OSHD ¶19,742 (Federal Railroad Administration).

28. See the August, 1976 issue of *Factory Magazine* at page 16. A study by Cornell University labor economist Robert Stewart Smith estimates OSHA has enough manpower to check a typical workers plant once every 10 years and a general business establishment once every 77 years. Smith, "The Occupational Safety and Health Act," 62 (1976).

29. Cases of harassment by OSHA are not uncommon. The Weyerhaeuser Company, for example, has been cited under the same corrugator noise standard seven times. In each case Weyerhaeuser duly contested the citations and was found not guilty. The enforcement

Thus, as one commentator has aptly stated:

"[R]eview by a disinterested party will stop any unnecessary or harrassing intrusions. This is a function that even a 'rubber stamp' magistrate may be able to serve. Although OSHA inspectors are not limited in the number of times they may enter any particular building, even a busy judge would be able to recognize when the request for additional entries crossed the bounds of reasonableness. Thus, no matter how narrowly drawn the statute is that authorizes the administrative entry, the warrant machinery never will become redundant and unnecessary. Discretion to enter should not be stripped from the unbiased magistrate and placed within the power of the field official." 44 Cincinnati L. Rev. 105, *supra*, at 112 (1975)

3. WARRANT REQUIREMENT WOULD FRUSTRATE INSPECTIONS

The Secretary also contends that imposition of a warrant requirement would impede the effectiveness of OSHA and frustrate the intent of Congress (Brief, pp 37, 38). Surprise,

(Footnote 29 continued)

pattern against Weyerhaeuser was: inspection followed by corrugator noise citation, employer appeal, dismissal, and reinspection which started the whole process all over again. Finally, after spending 1642 man-hours of valuable working time and \$43,200 in actual litigation defense expenditures, Weyerhaeuser had had enough. So when OSHA attempted, after a similar inspection only five months earlier, to reinspect Weyerhaeuser's Warren, Michigan plant "to conduct the same study they did before" - Weyerhaeuser sought and obtained a preliminary injunction in federal court. *Weyerhaeuser Company v. Maurice S. Reizen et al.*, No. 7-71052 (ED Mich. June 7, 1977).

unannounced inspections - it is said - are essential to the enforcement of the statute.

This argument is belied by the Act itself, the legislative history of the Act, the Secretary's own procedures, and actual experience.

The Secretary urges that if an employer could gain delay by refusing an inspection without a warrant, his refusal would provide him with the functional equivalent of advance notice, allowing him to correct any hazardous working conditions during the interval between refusal and issuance of the warrant. (Brief, p. 39)

This argument is completely refuted by the fact that *the Act itself provides no sanctions for refusals to permit inspections* (which is strong evidence of Congress' intent in the matter³⁰) - and by the Secretary's own regulations and procedures!

"Quite obviously, the Secretary of Labor is cognizant of the limitations placed upon his authority to conduct administrative searches. The intent of Congress to deny the arbitrary authority herein asserted is demonstrated by the provisions of 29 C.F.R. § 1903.4, and the Secretary's recognition of these limitations is manifested by the [inspection warrant] provisions of the OSHA Com-

30. 18 U.S.C. § 2236 also appears indicative of Congress' attitude in general on warrantless searches. That section imposes fines and imprisonment against government officers, agents or employees for searching private dwellings or "any other building or property" without a search warrant.

pliance Operations Manual itself." *Usery v. Rupp Forge*, OSHD ¶ 20,914 at p. 25, 113³¹

In sum, the Act itself, and the Secretary's own regulations prevent "instant inspections."

Moreover, in actual practice the Secretary has been functioning effectively under the warrant requirement. Numerous cases exist where the Secretary, upon being refused entry, has secured an administrative inspection warrant, pursuant to the procedure outlined in his Compliance Operations Manual.³² And if surprise is critical and the Secretary has reason to believe an employer will refuse entry, the Manual provides:

31. A copy of the pertinent portions of Chapter 5 of the Manual is included as Appendix C so that this Court may read for itself the Secretary's original interpretation of § 8(a) of the Occupational Safety and Health Act.

Also attached is a copy of a letter to Congressman Robert Eckhardt from the Secretary of Labor emphasizing that it is OSHA's procedure to secure a search warrant where the employer does not consent to an inspection. This letter was forwarded to undersigned counsel in response to a previous letter to Congressman Eckhardt. In that letter the Secretary says flatly that "in the relatively few cases where the employer refuses to permit the OSHA inspector to enter, * * * an appropriate warrant is obtained before proceeding further."

32. See e.g. *Gilbert & Bennett Manufacturing Co.*, F.Supp. (ND Ill, April 12, 1977) OSHD ¶ 21,798; *Marshall v. Beam Truck and Body Inc.*, CA No. 77-0031M, F.Supp. (D. RI, May, 1977)

See also remarks of Edward A. Bobrick, Regional Counsel for OSHA, U.S. Department of Labor, Chicago, Illinois to the American Bar Association, Section of Labor Relations Law, Institute on Occupational Safety and Health Law, April 29, 1976, to the effect that as a normal policy his office proceeds with an inspection warrant because it gains entry with a minimum amount of time.

"In cases where a refusal of entry is to be expected from the past performance of the employer, or where the employer has given some indication prior to the commencement of the investigation of his intention to bar entry or limit or interfere with the investigation, a warrant should be obtained before the inspection is attempted."

Thus the element of surprise is preserved while affording the employer his constitutional rights.

The Secretary's argument that the warrant requirement cannot function here is simply not credible, in view of his own regulations, actual practice, and past experience, and the Act itself.

"Administration officials may therefore maintain their rigorous inspection program without drastic modification. Indeed, if an employer does refuse entry, the element of surprise, deemed essential by Congress, is hardly undermined by the warrant requirement. Whereas formerly the Administration instituted legal proceedings to enjoin the employer's resistance, now it would instead demonstrate to a magistrate the requisite probable cause to obtain a warrant. Neither procedure increases delay or diminishes surprise more than the other, nor do safety conditions permit the ease of concealment or correction that surprise prevents in the case of guns and liquor. XI Suffolk University L.Rev., supra, at 168.

Clearly, the warrant requirement should not be discarded

merely for the convenience of the Secretary.³³ "Although some added burden will be imposed upon the [Secretary], this inconvenience is justified in a free society to protect constitutional values." *United States v. United States District Court For The Eastern District of Michigan*, 407 U.S. 297, 321 (1972)

4. EMPLOYERS HAVE NO SIGNIFICANT PRIVACY INTERESTS

The breadth of the Act, the unlimited scope of OSHA inspections, actual experience, and review of the applicable constitutional and case authorities substantiate that OSHA inspections are significant intrusions into employers' justifiable expectations of privacy. *Dunlop v. Hertzler Enterprises Inc.*, 418 F.Supp. at 632.

However, the Secretary contends that by opening the otherwise non-public portion of his premises to employees, knowing they may observe and report any violation of the Act, the employer relinquishes any justifiable expectation of privacy in such premises. In effect he grants to the employees "common authority" over the premises, and their interest in a safe and healthful environment amounts to "consent" to search which is valid as against the employer (Brief, pp. 30, 31). And the employer may not assert his ownership interest in the premises to bar the way of the inspector (Brief, p. 29).

33. The lower court's note that "Expediency is the argument of tyrants, it precedes the loss of every human liberty" seems particularly appropriate. The end does not justify the means in a constitutional system. 424 F.Supp. at n. 4.

The Secretary's argument has been repeatedly rejected by this Court in similar contexts. In *Chapman v. United States*, 365 U.S. 610 (1961), the Court held that a landlord's authority to enter his tenant's premises to view waste did not justify a search and seizure by police based solely on the landlord's consent. In *Stoner v. California*, 376 U.S. 483 (1964), the Court held that a hotel clerk could not authorize a police search and seizure of a tenant's room:

"It is important to bear in mind that it was the petitioner's constitutional right which was at stake here, and not the night clerk's or the hotel's. It was a right, therefore, which only the petitioner could waive by word or deed, either directly or through an agent. . . .

"No less than a tenant of a house, or the occupant of a room in a boarding house . . . a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures . . . That protection would disappear if it were left to depend upon the unfettered discretion of an employee of the hotel." 376 U.S. at 489, 490.

It must be remembered that it is the *employer's* constitutional right that is involved here. That constitutional right was recognized and defined in *See v. Seattle*.

"The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." 387 U.S. at 543.

This Court recognized in *See* that an employer has a "justifiable expectation of privacy" in the private, non-public portion of his business premises.

The Secretary's argument that no such privacy interest exists wherever there is a "workplace where work is performed by an employee of an employer"³⁴ is patently untenable. The *Hertzler* case where OSHA tried to inspect Hertzler's home is a prime example. In fact, the Secretary makes no pretense that private residences are per se excluded from OSHA jurisdiction.³⁵ A homeowner who hires a carpenter to remodel his house is subject to OSHA inspections. "Mom and Pop" businesses where the proprietors live on the premises are also subject to OSHA. To say that an employer has no legitimate expectations of privacy in such circumstances is absurd.

In *See* and *GM Leasing* this Court said that business premises may be reasonably inspected in more situations than private homes. But what the Secretary apparently does not understand is that the Court held that *even in those additional situations* where business premises may be reasonably inspected "the basic component of a reasonable search under the Fourth Amendment -- that it not be enforced without a suitable warrant procedure -- is applicable." 387 U.S. at 546.

As this Court confirmed in *See*, even though employees are authorized and expected to be upon the private premises

34. *Baird v. State of Utah*, *supra*, at p. 25, 830.

35. See e.g. comments of Mike Levine of the Labor Department's Solicitor's Office, as reported in the Congressional Record, June 23, 1977, p. E4026.

of a business, that does not reduce the expectation of privacy that the businessman is justified in holding, that the public at large or law enforcement officers will not enter or view the premises.

5. WARRANTLESS INSPECTIONS UNDER OTHER REGULATORY STATUTES

As a final justification for extending the holding in *United States v. Biswell* to authorize warrantless OSHA inspections, the Secretary cites several cases decided under other federal regulatory statutes -- and three OSHA cases. None support the Secretary's position.

U.S. ex rel Terraciano v. Montanye, 493 F.2d 682 (2d Cir. 1974), upheld as constitutional a warrantless inspection and seizure of the narcotics records of a licensed pharmacist. *Terraciano* quoted and followed *Biswell* in recognizing an exception to the warrant requirement for regulatory inspections of licensed activities.

In urging the right to conduct a warrantless inspection, the State argued in *Terraciano* that *in accepting his license* the pharmacist had impliedly consented to state inspection. When compared to this Court's language in *Biswell* that "when a dealer chooses to . . . accept a federal license, he does so with the knowledge that his business records, firearms and ammunition will be subject to effective inspection," 406 U.S. at 316, *Terraciano* obviously provides no authority for any extension of *Biswell*.

The Secretary also cites and relies on *United States v. Del Campo Baking Mfg. Co.*, 345 F.Supp. 1371 (D. Del.

1972) and *United States v. Business Builders, Inc.*, 354 F. Supp. 141 (N.D. Okla. 1973), which involved the validity of warrantless inspections under the Federal Food, Drug, and Cosmetic Act.³⁶

Interestingly, the Third, Fifth, Eighth and Ninth Circuits have all held that either consent or a warrant is required to conduct FDA inspections. See *United States v. Thriftmart Inc.*, 429 F2d 1006 (9th Cir. 1970), cert. den., 400 U.S. 926; *United States v. Hammond Milling Co.*, 413 F2d 608 (5th Cir. 1969), cert. den., 396 U.S. 1002; *United States v. Kramer Grocery Co.*, 418 F2d 987 (8th Cir. 1969); *United States v. Stanack Sales Co.*, 387 F2d 849 (3rd Cir. 1968); *United States v. Alfred M. Lewis, Inc.*, 431 F2d 303 (9th Cir. 1970), cert. den., 400 U.S. 878.

The District Court in *Del Campo Baking*, however, construed the Supreme Court decision in *United States v. Biswell* to allow warrantless FDA inspections in pervasively regulated food and drug businesses.

"The fact that Congress has not required the Del Campo business to obtain federal licenses to operate is wholly immaterial. Defendants' business of manufacturing, processing, packing and distributing food products for introduction into interstate commerce is as 'pervasively regulated' by the Federal Food, Drug and Cosmetic Act, and the regulations promulgated thereunder, as if it were federally licensed. No rational or valid distinction can be drawn for compliance inspections between a federally licensed business and one so

36. 21 U.S.C. §374(a)

completely regulated by the Act under the commerce power." 345 F.Supp. at 1376, 1377

The District Court in *Business Builders* merely follows the reasoning in *Del Campo Baking*.³⁷

Significantly, both of these cases were decided before *Almeida-Sanchez*, *Western Alfalfa* and *GM Leasing* reaffirmed *Camara* and *See*. However, even if the circuit court decisions on FDA inspections are wrong, and even if *Del Campo Baking* and *Business Builders* are correct in extending *Biswell* to employers engaged in pervasively regulated, if not licensed, industries -- they have no application to OSHA inspections because *not all of the five million places of employment in this country are "as pervasively regulated as if [they] were federally licensed."* 345 F.Supp. at 1377.³⁸

In *Youghiogeny and Ohio Coal Co. v. Morton*, 364 F. Supp. 45 (S.D. Ohio, 1973) (three-judge court), the court refused to find the inspection procedures of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq., which the court assumed to authorize warrantless

37. Although the Secretary also appears to rely on *United States v. Litvin*, 353 F.Supp. 1333 (D. D.C., 1973), that case is totally inapposite because there the Court concluded "that Litvin did openly and voluntarily consent to the inspection."

38. Also, FDA inspectors *know with a certainty* that the concerns searched manufacture and label food, cosmetic and/or prescription drugs. Compare *Almeida-Sanchez* on this point at 413 U.S. 271. By contrast, *Barlows Inc.* is not licensed, it has no history of close regulation, and OSHA is not limited to such businesses. "Nor is there any reason whatever, let alone a certainty, to believe that the thing sought to be controlled -- hazardous working conditions--exists in the area to be searched." *Gibson*, *supra*, at p. 162.

searches, to be unconstitutional. Its holding was based upon implied consent inferred from participation in the "pervasively regulated" coal industry:

"Plaintiff does not, of course, argue that the coal industry is not a "regulated" one within the meaning of *Almeida-Sanchez*. Nor do we understand the plaintiff to contest the historicity of such regulation under the standard of *Colonnade*, where the Court noted that the liquor industry has '... long [been] subject to close [governmental] supervision and inspection.' *Id.*, 397 U.S. at 77, 90 S.Ct. at 777. Also see *LaRue v. California*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed. 2d 342 (1973). We believe the same is equally true of the coal industry which, as noted above, has long been held subject to the Congress' powers under the Commerce Clause. It would appear then that plaintiff at bar, a business in a pervasively regulated industry, *has consented* by implication at least, to reasonable intrusions by federal authorities." (Emphasis added) 364 F.Supp. at 49, 50.

The court specifically pointed out in its footnote 7:

"Our view might be entirely otherwise were we not dealing with a business context of a nearly inherently dangerous type. If Congress, for example, after taking note of the wide incidence of crime, authorized warrantless entry into private homes, we would be unable to reconcile such a statute with the command of the Fourth Amendment. 364 F. Supp. at 52

Although involving safety, *Youghioghney* is clearly distinguishable from the situation under OSHA. It cannot be said that the five million businesses covered by OSHA have been historically and pervasively regulated, and that their business is of an "inherently dangerous type." Further, the court in *Youghioghney* noted that there was no right to search offices on mining property. Under OSHA, however, the compliance officer is "entitled" to conduct an unlimited search in any location to which employees normally have access, including offices.

The case of *United States v. Western & A.R.R.*, 297 F. 482 (ND Ga. 1924) falls within the long recognized "open fields" doctrine mentioned in *Western Alfalfa*, and is totally inapplicable here. The Georgia court indicated that the inspectors did not enter "any office or private place" but "only that they went upon the open tracks, where the cars were used, and looked at them." The court rightfully concluded that "a search is not made merely by looking at that which is open to view."

The lower court case most directly supporting the Secretary is *Brennan v. Buckeye Industries, Inc.*, 374 F.Supp. 1350 (S.D. Ga. 1974), which upheld a warrantless search under OSHA. After discussing, in light of *Colonnade*, *Biswell*, *Terraciano*, and *Youghioghney*, the company's contention that *Camara* and *See* required the Secretary to obtain a warrant, the court stated:

"Buckeye Industries is, constitutionally speaking, marching to the beat of an antique drum."

In making that statement and in holding as it did, the court

was clearly in error, as is obvious from *Almeida-Sanchez*, *Western Alfalfa*, and *GM Leasing*, all of which cases expressly reaffirm that *Camara* and *See* are not "antique drums."³⁹

The other OSHA case cited by the Secretary is *Dunlop v. Able Contractors*, (D. Mont., Civ. No. 75-57-BLG, Dec. 15, 1975) wherein the Court relied entirely on *Buckeye* in allowing a warrantless inspection. There is no mention of *Almeida-Sanchez* or *Western Alfalfa*. Had the Court been aware of these cases it most surely would not have granted OSHA's petition, since Judge Battin stated:

"This decision is regrettable; I find the Occupational Safety and Health Administration and its position in this case to be very distasteful."⁴⁰

The Secretary also mentions in passing *Lake Butler Apparel Company v. Secretary of Labor*, 519 F.2d 84 (5th Cir. 1975). However, the court there did not reach the Fourth Amendment issue because the OSHA search in that case was purely consensual.

39. Commentators have been unanimously critical of the decision in *Buckeye Industries*. See "*Brennan v. Buckeye Industries Inc.: The Constitutionality of an OSHA warrantless search*" 1975 Duke L.J. 406, which concluded that it was the court, not the corporation that was out of step. See also note 22, *supra*.

40. It should be noted that the three-judge court in *Dunlop v. Hertzler* specifically considered the *Able Contractors* case and found it, like *Buckeye*, to be not controlling.

Judge Battin is apparently now aware of *Almeida-Sanchez*, *Western Alfalfa* and *GM Leasing*. On September 1, 1977, he dismissed OSHA's Petition for an Order compelling an inspection in *Empire Steel Manufacturing Co. v. Marshall*, F.Supp. No. CV-77-48-BLG, (D. Mont.)

In short, none of the lower court cases relied on by the Secretary support his contention that general warrantless regulatory searches are a long accepted practice. They substantiate instead that *Camara* and *See* are in fact the general rule, to which *Biswell* is the narrow exception.

The "border stop" cases have no application in the present case. Border stops have never been governed by the warrant and probable cause provisions of the Fourth Amendment. The rationale for this exception is set forth in *Carroll v. United States*, 267 U.S. 132, 154 (1925):

"Travellers may be so stopped in crossing an international boundary, because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in"

See also *Boyd v. United States*, 116 U.S. 616, 623 (1886):

"As this act [the first statute authorizing customs inspections at the border, Act of July 31, 1789, ch. 5, 1 Stat. 43] was passed by the same Congress which proposed for adoption the original Amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the Amendment."

Even in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) which upheld warrantless "stops" at fixed checkpoints, this Court carefully distinguished "stops" from "searches" and the situation there involved from that in *Camara*.

VI. THE PROBABLE CAUSE REQUIREMENT

If the Court holds warrantless OSHA inspections unconstitutional -- as indeed we feel the Fourth Amendment constrains it to do -- the Court would then appear to have three alternatives:

(1) The Court can declare the inspection provisions of the Act unconstitutional and thereby require Congress to formulate a "suitable warrant procedure" ⁴¹ including "reasonable legislative or administrative standards" (per *Camara*) to assist the Courts in determining probable cause for the issuance of such warrants. This is the course which the lower court believed proper.

(2) The Court can hold only that warrants are constitutionally necessary to compel objected-to OSHA inspections.

(3) The Court can hold that the Fourth Amendment warrant requirement applies to OSHA inspections -- and definitively set forth those criteria upon which lower courts can rely in determining "administrative probable cause" to issue OSHA inspection warrants.

In the event the Court pursues the latter course, we here

41. As it has done under other laws. See e.g. Controlled Dangerous Substances Act, 21 U.S.C. §880.

provide an analysis of the case law and opinions of the commentators ⁴² concerning the appropriate factors to be considered in determining the existence of "administrative probable cause" for the issuance of OSHA inspection warrants.

Such an analysis must of course begin with *Camara v. Municipal Court*, where this Court first indicated a somewhat relaxed standard of probable cause is appropriate for administrative inspection warrants. After distinguishing administrative and criminal searches the Court said:

"... This is not to suggest that a health official need show the same kind of proof to a magistrate to obtain a warrant as one must who would search for the fruits or instrumentalities of crime. Where considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken." 387 U.S. at 538

42. Although there are relatively few cases on the subject of administrative probable cause, numerous commentators have discussed this very difficult question. See e.g. Lefave, "Administrative Searches And The Fourth Amendment: The *Camara* and *See* Cases," 1967 Supreme Court Review 1; Comment, "Administrative Inspection Procedures Under The Fourth Amendment -- Administrative Probable Cause" 32 Albany L.Rev. 155 (1967); Sonnenreich and Pinco, "The Inspector Knocks: Administrative Inspection Warrants Under An Expanded Fourth Amendment," 24 SWLJ 418 (1970); Note, "Administrative Search Warrants," 58 Minn L. Rev. 607 (1974); Greenberg, "The Balance of Interests Theory And The Fourth Amendment: A Selective Analysis of Supreme Court Action Since *Camara* And *See*," 61 Calif. L.Rev. 1011 (1973).

In the case of "area searches" to enforce uniform municipal building codes, for example, the Court said that probable cause "will not necessarily depend upon specific knowledge of the condition of a particular building." In such cases probable cause may be based upon "the passage of time, the nature of the building (e.g. a multi-family apartment house), or the condition of the entire area."⁴³ In other cases -- the Court went on -- where experience shows the need for periodic inspection, "the passage of a certain period without inspection might of itself be sufficient in a given situation to justify the issuance of a warrant."⁴⁴

The Court pointed out that this new probable cause standard was not intended "to authorize a 'synthetic search warrant' and thereby to lessen the overall protections of the Fourth Amendment,"⁴⁵ but reminded that the warrant procedure in administrative searches is "designed to guarantee that a decision to search private property is justified by a reasonable governmental interest" -- just as it has always been, even in criminal cases.⁴⁶

In securing warrants to conduct OSHA inspections the Secretary contends he need only show that a particular establishment is "apparently covered" by the Act (Brief, p. 51, n. 27). He argues that the "reasonable governmental interest" -- hence probable cause -- is established by the simple existence of the Act.

43. 387 U.S. at 538.

44. Ibid.

45. 387 U.S. at 538.

46. 387 U.S. at 534, 535.

The Secretary's argument, if accepted, would have the result of "authorizing synthetic search warrants and thereby lessening the overall protections of the Fourth Amendment" which this Court repudiated in *Camara*.

In *Camara* the Court specifically mentioned, by way of example, *certain specific relevant factors* which a judge or magistrate could consider in making a probable cause determination. These factors were *in addition to* the mere existence of the ordinance itself. Likewise, in *Almeida-Sanchez*, Justice Powell in his concurring opinion mentioned that "although standards for probable cause" in the context of administrative warrants "are relatively unstructured, there are a number of relevant factors which would merit consideration."⁴⁷ He then went on in that case to list several factors to be considered -- *in addition to the statute itself* -- in determining probable cause for issuing a warrant to conduct an area border search. See also *United States v. United States District Court*, 407 U.S. at 323.

In effect, this Court has taken the view that the evidentiary requirement of the Fourth Amendment is not a rigid standard, requiring precisely the same quantum of evidence to support a warrant in all cases. Instead, it is a flexible standard permitting a lesser quantum of evidence when the search is less intensive than that generally permitted in a criminal investigation. But at the same time there still must be *some* particular evidence concerning the place to be searched.⁴⁸

47. 413 U.S. at 283.

48. See Lefave, *supra*, at pp. 17-20.

It seems clear, then, that Fourth Amendment protections -- as previously expressed by this Court in *Camara*, *Almeida-Sanchez* and *U.S. District Court* -- mandate a showing of something more than simply that an establishment is "apparently covered" in order to establish probable cause for issuance of an OSHA inspection warrant.

The lower courts have generally followed this rule in deciding whether appropriate probable cause existed to issue OSHA administrative inspection warrants.

In *Dunlop v. Hertzler Enterprises Inc.*, supra, the Secretary secured an inspection warrant without making any showing of probable cause. Thus, one of the issues in *Hertzler* was whether "29 U.S.C. § 657(a) permits OSHA compliance officers to conduct a nonconsensual inspection of a business covered by the Act without first making any showing of probable cause." 418 F. Supp. at 629 (emphasis added)

The Court reviewed all the applicable authority on administrative searches, and concluded that OSHA could

"conduct nonconsensual inspections only pursuant to the authority of a warrant issued upon satisfaction of standards of probable cause which have been articulated in the area of administrative searches... 418 F.Supp. at 634.

The Court noted that

"The warrant application included only a recitation of the OSHA inspection provisions as autho-

rity for the proposed inspection plus statements to the effect that inspection of Hertzler was necessary to determine its compliance with OSHA and that OSHA inspectors previously had been denied entry." 418 F.Supp. 629, n. 3

Therefore, the Court threw out the warrant and held that

"Since no showing of probable cause was made for the issuance for the warrant to inspect Hertzler an injunction will be issued permanently restraining the plaintiff from making a non-consensual entry, inspection and investigation of the Hertzler premises . . ." 418 F.Supp. at 634

The *Hertzler* court expressly rejected the Secretary's position that he need only show an employer is "apparently covered" by the Act to secure a warrant.

In *Brennan v. Gibson's Products*, supra, the Secretary stipulated that the provisions of the Act do not constitute probable cause per se.⁴⁹ And the court in *Usery v. Centrif-Air*, supra, also found the Act in and of itself does not serve as probable cause sufficient to support an OSHA administrative inspection warrant.⁵⁰ In *Re: The Matter of Work Site Inspection of Alfred Calcagni & Sons, Inc.*, No. CC 77-0046M (D. RI, May, 1977) held likewise.

Marshall v. Shellcast, supra, involved an inspection of a foundry. The Secretary based his warrant request on "the basis that in 1973 the incident rate in the iron and steel

49. 407 F.Supp. at 155 n. 2, 156

50. 424 F.Supp. at 961 n. 3

foundry industry was approximately three times that of employers generally." The Court held the probable cause requirement for nonconsensual OSHA inspections of a particular employer's premises cannot be satisfied by reference to industry-wide violation statistics when detailed information regarding the premises sought to be investigated is otherwise available.

"It is unnecessary and inappropriate to use an incident rate mechanism for a national industry as justification for a search when, as here, the particular incident rate of a particular plant can be obtained if it is not already obtained. In short, the court, while certainly recognizing what *Camara* has said, is also saying that where individualized information is present, OSHA or other similarly situated organizations cannot close their eyes to the individual situation, relying upon some national accumulated group of statistics."⁵¹ 46 U.S.L.W. 2080.

Several state courts have also held there must be at least some particularized information as to the individual establishment to be inspected, in order for probable cause to exist. In *State of Oregon v. Keith R. Foster*, supra, OSHA secured two inspection warrants. The only "cause" shown was that this was a "routine safety inspection" authorized by the statute. The Circuit Court found

51. Another foundry case, *Marshall v. Chromalloy American Corporation, Federal Malleable Division*, F. Supp. (ED Wisc. July 12, 1977) OSHD ¶ 22,008, held that because foundries are subject to a "national emphasis program" probable cause existed to support a warrant in that case. We believe the sparse reasoning in *Chromalloy* is thoroughly refuted by the subsequent *Shellcast* case in the Northern District of Alabama. Besides, if a "national emphasis program" constitutes per se probable cause, then the Labor Department bureau-

"The only grounds recited in the Warrant for its issuance were that the inspection was 'a routine inspection of a place of employment pursuant to ORS 654.067' and that 'The records of the Accident Prevention Division indicate that the firm has not been inspected pursuant to the Oregon Safe Employment Act, ORS 654, since December 12, 1974.'"

"At no time in these proceedings, either in support of its applications for Inspection Warrants or during the hearing on the Order to Show Cause, has the Accident Prevention Division made, or attempted to make, any showing of probable cause to believe that a condition of non-conformity with a safety or health statute, ordinance, regulation, rule, standard or order exists or has existed on defendant's business premises, or that defendant has ever had an employee who suffered death, injury, or illness as a result of his employment in defendant's business."

The Court therefore concluded that the Oregon statute violated both the Fourth Amendment and Oregon Constitution. *State of California v. Melvin Salwasser* and *Baird v. State of Utah*, supra, employed the same reasoning and

(Footnote 51 continued)

cracy can effectively side-step the Fourth Amendment by the simple expedient of instituting a new national emphasis program whenever necessary.

North Carolina v. Butler, mentioned supra at note 19, is an example of the fallacy of statistics. There the State predicated its warrant request on the fact that trailer manufacturing businesses (such as *Butler's*) had an unusually high injury rate. However, *Butler* had had only one minor finger injury in the previous twelve years!

reached the same result.⁵²

Further, in requiring at least some individualized showing of probable cause for administrative inspection warrants, the courts in OSHA and other inspection cases have identified a "number of relevant factors."⁵³ These factors -- which a judge or magistrate may consider in determining whether appropriate probable cause exists to issue an OSHA (or other) administrative inspection warrant -- include:⁵⁴

1. Is the employer actually subject to the Act, or has OSHA been pre-empted by some other agency? e.g. *Marshall v. Great Lakes Dredge and Dock Co.*, and cases cited at note 27, *supra*

2. Is there an employee complaint of a hazardous working condition? e.g. *Marshall v. Beam Truck and Body, Inc.*; *Gilbert and Bennett Mfg. Co.*, *supra*.

3. Is there a past history of violations? e.g. *Gilbert and Bennett Mfg. Co.*, *supra*.

52. Many states, in assuming administration and enforcement of OSHA pursuant to their "approved state plan" have adopted statutes specifically providing for administrative inspection warrants. Often these statutes provide *criminal penalties* for failure to honor warrants issued only on the basis that a proposed inspection is "routine" (e.g. Ore. Rev. Stats. 654.067 and § 1822.52 Anno. Calif. Code) or that the inspection is part of a "legally authorized program of inspection which naturally includes that property" (e.g. N.C. Gen. Stat. § 15-27.2). Such statutes permit OSHA to get an *ex parte* writ (warrant) of assistance without any probable cause showing -- and to impose criminal sanctions for failure to honor such writs. See note 19, *supra*.

53. As did Justice Powell at 413 US 283.

54. The State of New York, for example, has been applying many of these factors and regularly issuing administrative warrants since the *Camara* decision in 1967. See Blabey, "See and Camara: Their Far-Reaching Effect on State Regulatory Activities and the Origin of the Civil Warrant in New York", 33 Albany L. Rev. 64 (1968).

4. Has the inspector observed any apparent violations (from viewing the premises or suspicious conduct)? e.g. *U.S. v. Blanchard*, 495 F2d 1329 (1st Cir. 1974); *Butler v. North Carolina*, No. C-77-191-G, (M.D.N.C.) June 16, 1977; *U.S. v. Consolidation Coal Company, et al* F2d (6th Cir. July 21, 1977), OSHD ¶ 22,007; *U.S. v. Greenberg* 334 F. Supp 364 (WD Pa. 1971).

5. Has the employer been inspected before; and if so, how recently? e.g. *Weyerhaeuser v. Reizen*, *supra*.

6. Has there been a recent work-related death at the employer's work place? e.g. *Gilbert and Bennett Mfg. Co.*, *supra*.

7. What do the employer's accident and injury records reveal?⁵⁵ e.g. *Marshall v. Shellcast*, *supra*.

These factors, together with those mentioned in *Camara*, and others which may conceivably be relevant to a particular employer or circumstance, have and will enable a judge or magistrate to intelligently determine whether probable cause exists to issue an OSHA inspection warrant.

55. All employers with ten or more employees are required by 29 USC § 657(c) and the Secretary's regulations to keep records of employee job-related injuries and illnesses. Falsifying such records subjects an employer to criminal penalties under 29 USC § 666(a). *U.S. v. Consolidation Coal Company*, *supra*, suggests the employer has no privacy interest in these records because they are maintained pursuant to the Act. ¶ 22,007 at p. 26, 511. *Shellcast* indicates the Secretary should request these records as part of their probable cause determination. Presumably, if the employer furnishes them willingly and they reflect a good safety record, in the absence of any other factors, probable cause to inspect will not exist.

VII. CONCLUSION

A Case Comment on the *Gibson's Products* decision in the December, 1976 issue of *Suffolk University Law Review* concluded:

"Only the most tortured construction of fact, history, and case law could constitutionally justify a warrantless OSHA inspection. Given the breadth of the statute and its potential for serious abuse, the preservation of individual rights demands strict adherence to the requirements of the fourth amendment."

This view has been overwhelmingly subscribed to by the courts. The decisions cited throughout this brief demonstrate convincingly that protections of liberty that have been deemed fundamental in this country since before the Revolution are not "the beat of an antique drum," but remain both vital and viable shields against every new experiment on our liberties.

Respectfully submitted

Robert E. Rader, Jr.
1266 E. Ledbetter
Dallas, Texas 75216
214/371-2395

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief
were mailed this day of September, 1977 to:

APPENDIX A

§ 657. Inspections, investigations, and recordkeeping

Authority of Secretary to enter, inspect, and investigate places of employment; time and manner

(a) In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized --

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HONORABLE EDWARD J. SCHWARTZ,
JUDGE PRESIDING

RAY MARSHALL, Secretary of Labor,
United States Department of Labor,
Petitioner

No. Misc. 785 -Civil
COURT'S RULING

vs.

GREAT LAKES DREDGE AND DOCK
COMPANY,
Respondent

REPORTER'S TRANSCRIPT OF PROCEEDINGS
San Diego, California
July 11, 1977

REPORTED BY: DONNA L. McQUEENEY
Official Court Reporter
CSR No. 2990

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APPEARANCES

For the Petitioner: JOHN M. ORBAN, ESQ.
Associate Regional Solicitor
By: THERESA KALINSKI, ESQ.
Office of the Solicitor
United States Department of Labor
3247 Federal Building
300 North Los Angeles Street
Los Angeles, California 90012

For the Respondent: CHICKERING & GREGORY
By: ROBERT W. TOLLEN, ESQ.
111 Sutter Street
San Francisco, California 94104

SAN DIEGO, CALIFORNIA, MONDAY, JULY 11, 1977,
10:45 A.M.

(Other matters).

THE COURT: Well, I recognize at the outset that there is some infirmity in the procedure that is being followed here by the Secretary of Labor with respect to the filing of what amounts to an application for an order, which is generally not a recognizable proceeding in the Federal courts. On the other hand, I think that possibly this is the kind of vehicle that the Secretary of Labor feels is the proper way to proceed, and to present the matter before the Court and to obtain some kind of ruling. I would at least pass over that for the moment because I think the appli-

cation for an order may be in effect regarded as being in the nature of a complaint, although it certainly doesn't meet the ordinary requirements of a complaint.

I think, however, there are more important concerns here than the question of the correctness of the procedure or the formalities involved. First of all, with respect to the matter of preemption, I think there is a pretty fair argument that can be made that the regulations of the Coast Guard do preempt. This is a vessel, or whatever, that is subject to Coast Guard jurisdiction and inspection. I don't think there is much question about that. And Section 4(b)(1) of OSHA does provide in part that "Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." And although there is no direct Ninth Circuit authority on this, other courts have held that this particular exemption from OSHA applies when another agency has actually exercised a statutory authority to regulate employees' safety.

The real problem that I see with the application, however, has to do with the problem that arises out of the Fourth Amendment. And there have been a number of cases where similar applications have run into trouble because of the belief of the courts that to grant the power or authority that seems to be visualized in Section 8(a) of OSHA would be to allow something to be done that is directly contrary to the requirements of the Fourth Amendment, prohibiting unreasonable searches and seizures.

Now, it is true that there are some cases which seem to

support the position of the Petitioner here, and of course, I'm referring primarily to the Colonnade Catering Corporation case, which is 397 U.S. 72, where the Court upheld a warrantless inspection of premises of a retail liquor dealer, and *United States v. Biswell*, 406 U.S. 311, which upheld a warrantless inspection of a firearms dealer. The problem, of course, with those cases is that they did definitely involve industries which were and had been for a long time subject to close supervision and inspection by governmental agencies. And in each instance, the business involved was one that was pervasively regulated.

I don't think that is the kind of business that we have here being conducted by the Great Lakes Dredge and Dock Company. I don't think there is any pervasive state or federal regulation that requires the kind of inspection authority that's being contended for here by the Government.

And I would call attention to the case of *Usery v. Centrif-Air Machine Company*, 424 F. Supp. 959, in which the Court says on page 961, "In light of more recent precedent, we must reject the Buckeye court's interpretation. Rather we agree with several recent well-reasoned decisions which have construed Colonnade and Biswell as narrow exceptions to *Camara* and *See* which operate to negate the warrant requirement for unconsented administrative inspections only when: (1) the enterprise sought to be inspected is engaged in a pervasively regulated business; (2) the inspection will pose only a minimal threat to justifiable expectations of privacy; (3) warrantless inspection is a crucial part of a regulatory scheme designed to further an urgent federal interest; and (4) the inspection may be carefully limited as

to time, place and scope."

And similarly in *Barlow's Incorporated v. Usery*, 424 F. Supp. 437, the Court on page 440 says, "We reject the notion as espoused in *Brennan v. Buckeye Industries*" -- omitting citations -- "that the *Colonnade* and *Biswell* decisions envision a trend of the Supreme Court to generally narrow the holdings of *Camara* and *See*. Instead, we find that the warrantless inspection scheme pursuant to OSHA is more properly aligned with and must be controlled by the holdings in *Camara* and *See*."

And then further on down the page, "We simply cannot overlook the fact that in *Colonnade* and *Biswell* the court dealt with an 'industry long subject to close supervision and inspection' and a 'pervasively regulated business.' We believe that both of those cases fit into the *Camara* categorization of 'certain carefully defined classes of cases.' We have no such industry in this case. OSHA applies to all businesses that affect interstate commerce."

And I think that is the problem and the infirmity with the kind of inspection that is sought here on behalf of the OSHA regulations. It simply envisions, that is the section under which the order is sought, merely envisions a kind of walk-in authority to make inspections at any and all times on behalf of the OSHA regulations. And the courts have not been attracted by that concept. And I am not either.

Accordingly, the application for an order to permit the OSHA entry for inspection purposes is denied, and the matter is dismissed.

MR. TOLLEN: May I submit an order, your Honor?

THE COURT: Yes. Will you please submit it to opposing Counsel for approval as to form?

MR. TOLLEN: Yes, your Honor.

Your Honor, is the Court's ruling based on both the preemption and the Fourth Amendment?

THE COURT: Well, it certainly is based on the Fourth Amendment. I think we place it squarely on that. I am not absolutely sold on the preemption, although I think it's there.

MR. TOLLEN: And I take it the order should refer solely to the Fourth Amendment?

THE COURT: Probably.

Thank you, Counsel.

MS. KALINSKI: Thank you, your Honor.

MR. TOLLEN: Thank you.

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CERTIFICATE

I, DONNA L. McQUEENEY, CSR, hereby do certify that I am a duly appointed, qualified and acting Official Court Reporter for the United States District Court, Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings held on July 11, 1977, in the matter of Ray Marshal, Secretary of Labor, United States Department of Labor vs. Great Lakes Dredge and Dock Company, Case No. Misc. 785 - Civil, consisting of pages numbered 1 through 7.

Dated this 29th day of July 1977.

s/ Donna L. McQueeney
DONNA L. McQUEENEY
Official Court Reporter
CSR No. 2990

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APPENDIX C

COMPLIANCE OPERATIONS MANUAL

JANUARY 1972

A manual of guidelines for implementing the
Occupational Safety and Health Act of 1970

UNITED STATES DEPARTMENT OF LABOR - J. D.
Hodgson, Secretary Occupational Safety and Health
Administration - George C. Guenther, Assistant Secretary

FOREWARD

On December 29, 1970, President Nixon signed the Williams-Steiger Occupational Safety and Health Act of 1970 (Public Law 91-596) thereby establishing a national commitment. Congress declared its purpose and policy was ". . .to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources--".

This Manual represents the effort of the Occupational Safety and Health Administration to develop effective guidelines necessary to implement the Act. Changes and additions will be made to the Manual on a continuing basis as determined necessary by experience gained.

Responsibility for the Occupational Safety and Health Administration field compliance operations program rests with each Regional Administrator. The instructions and procedures contained within this Manual shall be followed to the degree necessary to assure effective and uniform implementation of the Act.

s/ G. C. Guenther
George C. Guenther
Assistant Secretary of Labor
Occupational Safety and Health
Administration

- b. The Area Director's approval of the CSHO inspection schedule shall be obtained prior to entering an establishment at other than day-time working hours, except where obtaining approval would cause undue delay.

2. *Refusal to Permit Inspection-Warrants*

- a. Section 8 of the Act provides that CSHO's may enter without delay and at reasonable times any factory or establishment covered under the Act for the purpose of inspecting with reference to safety and health standards issued under the Act. The CSHO shall tactfully present his credentials to the owner, operator or agent in charge at the establishment and explain generally the nature and purpose of his visit. He should further explain generally the scope of the inspection and the records he wishes to review.
- b. In cases where a CSHO encounters a refusal to permit entry, he should advise his Area Director, who will in turn refer the matter to the appropriate Regional Administrator and the Regional Solicitor with a request that an inspection warrant be obtained.
- c. If an employer refuses to permit an inspection, the CSHO should advise the employer that the Act (Section 8(a) provides for an inspection, but he shall not state or imply that the law provides any penalty for refusing permission to inspect. If there is still a refusal to permit inspection, CSHO shall endeavor to ascertain the reason for such refusal. He will leave the premises and shall immediately report the re-

fusal and the reason therefore to the Area Director. The AD shall immediately consult with the Regional Administrator and the Regional Solicitor who shall promptly take appropriate action including compulsory process, if necessary.

- d. In doubtful cases where permission is not clearly given, or where the employer shows hesitation, or absents himself for a period of time, the CSHO should proceed as indicated. He should not engage in argument or discussion concerning refusal, with the exception that he shall inquire briefly as to the reason for refusal, or may answer reasonable question (e.g., the scope of the inspection and its purpose), but he should avoid any impression of insistence or intimidation concerning his right to inspect.
- e. In cases where entry has been allowed and the employer interferes with or limits an important aspect of the investigation, the CSHO should decide whether to complete the inspection to the extent possible, or to discontinue the inspection and through the Area Director alert the Regional Administrator, and request the Regional Solicitor to seek an *inspection warrant*. For example, if the employer refuses to permit the walkaround or to permit the CSHO to examine records which are essential to the inspection, the inspection should be discontinued and an *inspection warrant sought*. In other cases where the employer interferes with or limits the inspection, the inspection should be completed and the matter discussed with the Area Director as to further appropriate action.

- f. In cases where a refusal of entry is to be expected from the past performance of the employer, or where the employer has given some indication prior to the commencement of the investigation of his intention to bar entry or limit or interfere with the investigation, a warrant should be obtained before the inspection is attempted. Cases of this nature should also be referred through the Area Director to the appropriate Regional Solicitor and the Regional Administrator alerted.
- g. The Regional Solicitor's office should be alerted immediately by telephone by the Area Director when it becomes necessary to request that a warrant be obtained. Thereafter, within 48 hours after the determination is made by the Area Director that a warrant is necessary, the Area Director will transmit to the Regional Solicitor: (1) a written summary of all facts leading to the refusal of entry or limitation on inspection; (2) all previous investigations of the employer, including previous safety and health investigations under such acts as the Walsh-Healey Public Contracts Act and the Longshoremen's Harbor Workers' Compensation Act; (3) so much of the current inspection report as has been completed; (4) information as to the name and position of the individual or individuals barring entry or limiting inspection; and (5) the names and addresses of any witnesses to the refusal or limitation of the inspection.
- h. *A warrant is a legal process issued by a United States Magistrate or a United States District Court Judge which will be directed to the CSHO authorizing the*

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CSHO to conduct an inspection of premises which will be described in the warrant. Under the terms of the warrant, the CSHO will be authorized to conduct an inspection of the described premises at reasonable times during ordinary business hours, and to inspect in a reasonable manner and to a reasonable extent, including the collection of samples, if necessary, an examination of the establishment and all pertinent equipment, finished and unfinished materials, structures, machines, records and all other things therein bearing on occupational safety and health. All questions arising concerning reasonableness of any aspect of an inspection conducted pursuant to a warrant shall be

(Emphasis added)

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U.S. DEPARTMENT OF LABOR
Office of the Secretary
Washington

Oct 16 1973
Received Oct 16 1973
Bob Eckhardt, M.C.

Honorable Robert C. Eckhardt
House of Representatives
Washington, D.C. 20515

Dear Congressman Eckhardt:

This is in response to your request for our consideration of a letter from Robert E. Radar, Jr., attorney at law, Dallas, Texas, concerning the alleged lack of legal due process afforded under the Williams-Steiger Occupational Safety and Health Act of 1970.

Mr. Radar states that "OSHA maintains its right to enter and inspect privately owned premises without a warrant of any kind" and in his view the inspection provisions of the Act violate the Fourth Amendment restriction on searches. As you know, Section 8(a)(1) of the Act authorizes the Secretary "to enter without delay and at reasonable times . . . any area . . . where work is performed by an employee of an employer" and inspect therein. This must be read in conjunction with Section 8(a)(2) which requires inspections and investigations to be conducted "during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner . . .". The inspections authorized are not "unlimited". In most instances the employer consents to the inspection, making a warrant

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unnecessary. However, in the relatively few cases where the employer refuses to permit the OSHA inspector to enter, the matter is referred to the Department of Labor's Regional Solicitor and *an appropriate warrant is obtained before proceeding further*. The law, and the Department's implementation thereof, I believe, complies with the constitutional protection against unreasonable searches and seizures. (Emphasis added)

* * * *

Sincerely,

s/ Ben Brown

Benjamin L. Brown

Deputy Under Secretary for

Legislative Affairs